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Supreme Court of the United States

October Term, 1985

EDWIN W. EDWARDS, *et al.*,

Appellants,

v.

DON AGUILLARD, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN JEWISH CONGRESS AND THE SYNAGOGUE COUNCIL OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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BRIEF OF THE AMERICAN JEWISH CONGRESS AND THE SYNAGOGUE COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICI

The American Jewish Congress is a membership organization founded in 1918 to protect the civil, political, economic and religious rights of American Jews. In the

decades since its founding this organization has collaborated with other minority groups in shared strivings to realize fully the constitutional guaranties of protection for conscience and liberty. Because the separation of church and state, particularly in the public schools, is an essential safeguard of the religious rights of Jews and other minorities, the American Jewish Congress has sought consistently to support the constitutional principles guaranteeing that separation.

The Synagogue Council of America is a coordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of the Central Conference of American Rabbis, representing the Reform rabbinate; the Rabbinical Assembly, representing the

Conservative rabbinate; the Rabbinical Council of America, representing the Orthodox rabbinate; the Union of American Hebrew Congregations, representing the Reform congregations; the Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations and the United Synagogues of America, representing the Conservative congregations.

The participation of AJCongress and the Synagogue Council in this case, with the consent of the parties, stems from a judgment that the legislation in question embodies a direct, albeit disguised, attack on the principles embodied in the Establishment Clause. While our membership embraces many who accept the Book of Genesis as literal truth, we oppose the teaching of any such doctrine, overtly or covertly, in the public schools.

INTRODUCTION AND SUMMARY OF ARGUMENT

To avoid undue repetition, this brief adopts the appellees' statement of facts and is limited to one point: Louisiana's Balanced Treatment Act violates the Establishment Clause because it lacks a genuine secular purpose.[1/]

Under the familiar three-part test of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), it is necessary to go no further than the first prong to hold the Louisiana Act unconstitutional. Notwithstanding the anomalous claim that its compulsions promote academic freedom and the misconceived characterization of creation-science as a natural "science," the Act lacks any genuine secular purpose.

1/ These amici concur as well in other arguments of the appellees but refrain from repeating or restating them.

A. Far from being secular, the visible purpose of the statute is to advance the fundamentalist account of creation in the Book of Genesis. Marked sixty years ago in the historic Scopes trial, the fundamentalist campaign has been varied but unrelenting. The Louisiana statute, the latest of these efforts, represents a changed strategy, not a changed purpose. It alters only trivially and cosmetically the Arkansas law held unconstitutional in the cogent decision in McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982). That decision, following the closely apposite principles of Epperson v. Arkansas, 393 U.S. 97 (1968), outlines the course appropriate for resolution of this appeal.

Despite superficial changes in phraseology, mostly in the nature of delet-

ing explicitly religious indicia, the statute here is not different from and not more defensible than the Arkansas precursor. Indeed, in the Louisiana legislative process identical religious motivations and purposes repeatedly slipped through, reflecting, as a sponsor said, that this is part of the uninterrupted campaign in a "battle [seen] as one between God and anti-God forces."

B. The asserted secular purpose of promoting "academic freedom" is a worthless play on words. Public school teachers in Louisiana have been free all along to teach the theory of evolution and questions about that theory. That freedom is not advanced, but is hobbled, by requiring them to teach the Book of Genesis, disguised only in word forms, if they teach evolution.

C. Creation-science is not science. While there are differences of refined detail, all scientists and philosophers of science today define science in terms of empiricism, observations of natural data, testability, verifiability and falsifiability. Creation-science falls utterly outside any acceptable definition. The fact that one or two scientists may swear conclusorily that creation-science is a science does not alter this conclusion or affect meaningfully this Court's final authority to define words in dispute and, more importantly, to determine the social facts identified by those words. When all is said and done, creation-science is an *a priori* set of propositions based upon religious faith, not scientific observation or testing. As a key proponent says, emphasizing a vital word, "There is not the

slightest possibility that the facts of science can contradict the Bible." That certainty rests upon convictions that may well be more profoundly significant than scientific propositions for many or most Americans. But they are religion, not science.

D. The ultimate judgment as to the lack of secular purpose will resolve a question of constitutional law, not a "triable" issue of fact. The question is no more appropriate for trial -- or repeated retrials -- than "factual" questions about the effects of racial segregation or, indeed, the question whether the posting of the Ten Commandments in schoolrooms has a secular purpose. In cases raising a question of this nature, while "evidentiary submissions may help answer it, the question is, like the question whether racial or sex-

based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts." Lynch v. Donnelly, 104 S. Ct. 1355, 1369 (1984) (O'Connor, J., concurring). In any event, if an evidentiary record is needed, there is an ample one here -- in the Louisiana legislative record and the trial record of McLean v. Arkansas Board of Education, supra -- comparable to the record deemed sufficient for the final ascertainment of constitutional facts in Leary v. United States, 395 U.S. 6 (1969).

ARGUMENT

THE LOUISIANA BALANCED TREATMENT ACT LACKS A SECULAR PURPOSE

For nearly forty years, this Court has time and again considered challenges to and held unconstitutional a wide array of state legislation promoting religion in public school classrooms.[2/] Out of this

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2/ See, e.g., Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (period of silence for voluntary prayer or meditation); Treen v. Karen B., 455 U.S. 913 (1982), aff'g mem., 653 F.2d 897 (5th Cir. 1981) (voluntary prayer statute); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (statute requiring posting of Ten Commandments on classroom wall); Epperson v. Arkansas, 393 U.S. 97 (1968) (statute prohibiting the teaching of evolution); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (local rule requiring daily prayer or Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (statute providing for voluntary, denominationally neutral prayer); Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (use of public school facilities for religious instruction under a "released time" program).

jurisprudence has emerged the guiding standard, first fully articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), which continues to be the "only coherent test a majority of the Court has adopted" for evaluating whether a statute runs afoul of the First Amendment's Establishment Clause. Wallace v. Jaffree, 105 S. Ct. 2479, 2494 (1985) (Powell, J., concurring). See, e.g., Witters v. Washington Department of Services for the Blind, 106 S. Ct. 748, 751 (1986); Wallace v. Jaffree, 105 S. Ct. at 2489-90; Thornton v. Caldor, Inc., 105 S. Ct. 2914, 2917 (1985). The first prong of that analysis, the test of secular purpose, is fatal to the Louisiana statute.3/

3/ Other Establishment Clause tests are inapplicable. The "strict scrutiny" approach employed in Larson v. Valente, 456 U.S. 228 (1982), applies only to state statutes or practices (unlike what is at issue here) "patently discrimina-
(footnote continued)

The Balanced Treatment Act is religious in purpose, no different ultimately in its substance than state laws

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tory" on their face. Lynch v. Donnelly, 104 S. Ct. 1355, 1366 n.13 (1984). Equally inapposite is the "historical acceptance" test used only once, in Marsh v. Chambers, 463 U.S. 783 (1983), which appellants contend establishes the validity of teaching creation-science in public school classrooms (Appellants' Br. at 29-31). Appellants' reliance on this standard is indicative of their apparent refusal to concede that science education has progressed substantially in the 200 years since the founding of the Republic. Moreover, their position embodies a fatal anachronism:

> The simple truth is that free public education was virtually nonexistent in the late eighteenth century. . . . Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools.

Wallace v. Jaffree, 105 S. Ct. at 2503 (O'Connor, J., concurring) (citation omitted).

declared unconstitutional over the past quarter-century mandating school prayers, Bible readings, and displays of the Ten Commandments, or banning the teaching of evolution in public school classrooms. Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968).

Despite some artful draftsmanship, the statute reveals on its face the goal of promoting the Judeo-Christian account of Creation and a Creator. The history of the creationist campaign for this result and the specific history of this statute add powerful force to this conclusion. The perverse claim that the compulsion to teach creation-science promotes "academic freedom" serves to underscore the absence of any real

secular purpose. Similarly, there is no intellectually respectable basis for dubbing creation-science a "science." As is true of any other religion that employs, as all may, words like "science" or "scientist" in its title, this characterization leaves the religious essence patent as a matter of law, not a triable issue of "fact" barring summary judgment.

A. The Visible Purpose of Louisiana's Law Is to Promote Fundamentalist Doctrine

The Balanced Treatment Act is merely the most recent revision of an old product from the religious fundamentalists responsible for Arkansas' unconstitutional anti-evolution enactments of the 1920s and the 1960s -- in which it was plain "that endorsement of religion or religious belief 'was . . . the law's reason for existence.'"

Wallace v. Jaffree, 105 S. Ct. at 2500 (O'Connor, J., concurring), quoting Epperson v. Arkansas, 393 U.S. at 108.

Despite cosmetic legislative efforts to disguise the measure's true intent, the legislative record as well as the historical and social background of the Louisiana law reveal that the State's Legislature was motivated by the impermissibly religious purpose of promoting fundamentalist doctrine.

To determine whether a statute is motivated by an impermissible religious purpose, its legislative history as well as the circumstances that preceded and culminated in its enactment may be considered. This kind of inquiry has been made in other cases involving the religion clauses, Wallace v. Jaffree, 105 S. Ct. at 2490-93; Epperson v.

Arkansas, 393 U.S. at 107-09; Two Guys, Inc. v. McGinley, 366 U.S. 582, 598 (1961); McGowan v. Maryland, 366 U.S. 420, 431-50 (1961), as well as cases posing questions of racial discrimination, Hunter v. Underwood, 105 S. Ct. 1916 (1985); Rodgers v. Lodge, 458 U.S. 613 (1982); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

Particularly when the issue is religion in public school classrooms, this Court has not hesitated to look beyond legislative avowals of secular intention to reveal an enactment's actual purpose. Purportedly "secular purpose" claims -- that daily Bible readings promote moral values or that the Ten Commandment displays on classroom walls are permissible because they have been adopted as part of the fundamental legal code of Western Civilization -- have

been brushed aside with the recognition that such activities are "plainly religious" in nature. Abington School District v. Schempp, 374 U.S. at 223; Stone v. Graham, 449 U.S. at 41. In those cases, as in this one, there was no need to examine legislative intent under a microscope to ascertain whether the legislatures' motives were genuine or but a pretense.

The soundness of this analysis was reaffirmed in the last Term. The question is

> [whether] the State's "actual purpose" in creating the program was to endorse religion, Wallace v. Jaffree, 472 U.S. ___, ___, 105 S. Ct. 2479, ___, 86 L. Ed. 2d 29 (1985), quoting Lynch v. Donnelly, 465 U.S. 668, 690, 104 S. Ct. 1355, ___, 79 L. Ed. 2d 604 (1984) (O'CONNOR, J., concurring), or [whether] the secular purpose articulated by the legislature is merely a "sham." Wallace,

supra, 472 U.S. at _____, 105 S. Ct. at ____ (POWELL, J., concurring).

Witters v. Washington Department of Services for the Blind, 106 S. Ct. at 751.[4/]

This approach is especially appropriate in the public school setting. This Court continues to recognize the importance of public education in daily American life. Most recently in Wallace v. Jaffree, striking down Alabama's law requiring a period of silence in the State's classrooms for "voluntary prayer or meditation," the special role played by public schools was again singled out for special attention. 105 S. Ct. at 2492 n.51; id. at 2503 (O'Connor, J., concurring).

4/ See also Wallace v. Jaffree, 105 S. Ct. at 2500 (O'Connor, J., concurring) ("I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one").

1. The Balanced Treatment Act Is The Product of a Long Course of Fundamentalist-Sponsored Anti-Evolutionary Initiatives

Louisiana's law was not created in a vacuum. It grows out of a decades-long campaign of anti-evolutionary initiatives by fundamentalist Christians, and is linked to a long series of legislative efforts to impose fundamentalist doctrine and suppress the teaching of evolution in the public schools. No ruling on the constitutionality of such efforts has failed to consider that history. See Epperson v. Arkansas, 393 U.S. 97 (1968); Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982); Wright v. Houston Independent School District, 366 F. Supp. 1208 (S.D. Tex. 1972), aff'd per curiam, 486 F.2d 137 (5th Cir. 1973), cert. denied, 417 U.S. 969

(1974). The court of appeals below, finding Louisiana's law unconstitutional for lack of a secular purpose, correctly took account of the statute's historical and social background. Aguillard v. Edwards, 765 F.2d 1251, 1256 (5th Cir. 1985).

The closest precursor of the Louisiana measure was the Arkansas Balanced Treatment Act struck down in McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982). But the Arkansas statute is only the latest link in a long chain of fundamentalist efforts to exclude the teaching of evolution from public schools. The McLean court's detailed findings relating to the history of the fundamentalist movement are not repeated here. It is sufficient to recall the highlights of the historical relationship

between creation-science and the anti-evolution movement.

Among the earliest initiatives in the anti-evolution crusade was, of course, the Tennessee statute criminalizing the teaching of evolutionary theory, the subject of the famous Scopes "monkey trial" case in 1925. See Scopes v. Tennessee, 154 Tenn. 105, 289 S.W. 363 (1927). Epperson v. Arkansas, 393 U.S. 97 (1968), declared a similar "anti-evolution" statute unconstitutional, holding that the Establishment Clause "does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." 393 U.S. at 106. The Court recalled familiar history in finding it "clear that fundamentalist sectarian conviction was . . . the law's reason for existence." Id. at 107-08.

The fundamentalists' first response was a legal challenge to the teaching of evolution on the theory that it violated their free exercise rights. That effort also failed.5/

Stymied in their attempt to bar evolution from the classroom, the creationists changed tactics and began to press for the inclusion of their own religious beliefs in the public schools. Tennessee legislated in 1974 to require equal time for the teaching of the Biblical version of creation and forbid instruction in evolutionary theory unless it was represented as "a theory" and

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5/ See Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972), aff'd per curiam, 486 F.2d 137 (5th Cir. 1973), cert. denied, 417 U.S. 969 (1974); Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) (rejecting effort to prohibit Smithsonian from displaying exhibits on evolution).

not as "scientific fact." The measure was quickly struck down. Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975).

The creationists now propose what they hope will be a less visibly sectarian version of the "equal time" approach. Two individuals leading this effort are Wendell R. Bird, appearing here for appellants as a Special Assistant Attorney General, and Paul Ellwanger, a respiratory therapist and founder of Citizens for Fairness in Education, a creationist organization. Adapting a draft prepared by Bird, Ellwanger prepared a model act calling for "balanced treatment" of "scientific creationism" and "evolution" in the public schools, which he then disseminated throughout the creationist community. McLean, 529 F. Supp. at 1261; see also D. Nelkin, The Creation Controversy

99-100, 138-39 (1982). The Arkansas enactment, as we have noted, was struck down in McLean as offensive to the Establishment Clause.

The court in McLean correctly found that Ellwanger had revealed the religious motives of the sponsorship in letters like this one to Louisiana State Senator Bill Keith, the sponsor of the Balanced Treatment Act now before the Court:

> I view this whole battle as one between God and anti-God forces. . . . [I]t behooves Satan to do all he can to thwart our efforts and confuse the issue at every turn.

529 F. Supp. at 1261.[6/] Realizing that

6/ Ellwanger was equally unequivocal about his ultimate purpose in a letter to Tom Bethell that spoke of "killing evolution instead of playing these debating games that we've been playing for nigh over a decade already." McLean, 529 F. Supp. at 1262.

association with fundamentalist ministers might jeopardize passage of balanced treatment legislation, Ellwanger advised Senator Keith to "opt for the non-ministerial" approach in promoting the bill. Id.

2. The Legislative History of Louisiana's Law Establishes Its Impermissible Religious Purpose

The Louisiana legislative record is strewn with evidence revealing a religious rather than a secular purpose. Statements by Senator Keith, other legislators, and proponents testifying on behalf of the legislation showed that the intent of the Balanced Treatment Act was to create a preference for a particular religious doctrine by "blot[ting] out a particular theory because of its supposed conflict with the Biblical account." Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

The process leading to the Act began with Senator Keith's introduction of Senate Bill 956 in June, 1980. The religious tenor of the bill was explicit and unmistakable, contrasting with the theory of evolution the theory of "creation ex nihilo" defined as "the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created [sic] ex nihilo and fixed by God." J.A. E-1 - 1b.7/

7/ "J.A." refers to the Joint Appendix.

There is no question that reference to "creation ex nihilo," and by implication to a supreme being or creator, is inherently religious. See Torcaso v. Watkins, 367 U.S. 488 (1961); Daniel v. Waters, 515 F.2d 485, 491 (6th Cir. 1975); McLean, 529 F. Supp. at 1265 ("creation of the world 'out of nothing' is the ultimate religious statement because God is the only actor"); see

(footnote continued)

As the process went forward, through a study resolution and hearings, this refrain continued. The debates featured views on God's relations to science, the necessity of or discomfort with belief in a supernatural creator, and questions whether "facts in religion" could be distinguished from "facts in science." See J.A. E-9; J.A. E-82-83; and J.A. E-613.8/ Religious views, mostly supportive but also some opposed to the legislation, were the consistent themes of the discussion. J.A. E-394-401. For the proponents, familiar strains were hostility

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also Malnak v. Yogi, 440 F. Supp. 1284, 1322 (D.N.J. 1977), aff'd, 592 F.2d 197 (3d Cir. 1979) ("concepts concerning God or a supreme being of some sort are manifestly religious . . . [and] do not shed that religiosity merely because they are presented as a philosophy or as a science").

8/ The quotation is from the original document, which has been incorrectly recopied in the Joint Appendix. Similar errors herein refer to this footnote.

to teaching children "they are evolved from apes," J.A. E-25, the influence of evolutionary thought on "backers of athiestic [sic] theories," J.A. E-66[9], and the idea of evolution or creation-science as exhaustive alternatives, J.A. E-280 (statement of Senator Keith) -- an idea aptly characterized by Judge Overton in McLean as a "contrived dualism." 529 F. Supp. at 1266. The conception emerged from time to time as an ulterior purpose to get rid of the teaching of evolution by requiring as a condition the coordinate or "balanced" teaching of creation-science.[10]

9/ See footnote 8, supra.

10/ Senator Keith stated at a November 25, 198[illegible] hearing:

> Either we need to take the teaching of the religion of secular humanism out of our public schools and teach neither or we need to teach both.

J.A. E-37-38.

(footnote continued)

In all the welter of debate essentially on religious lines, the only hints of a secular purpose were in the superficial "correction" of language that disclosed the religious intent,[11] and in the declarations of an impartial purpose to promote balance, the whole truth, and "academic freedom."

Dr. Charles Harlow, a creation-scientist, similarly advocated to the legislators that "neither idea [be] taught. . . ." J.A. E-66.

[11] The work to achieve "secular" coloration was reflected in this statement by Senator Saunders to Senator Keith in support of his amendment deleting language disclaiming the teaching of religion:

> I think the reason you had that language in the bill is probably for when it goes to court you can say that you're not teaching religion.

J.A. E-441. See footnote 8, supra.

The pretextual character of these protestations is itself revealing, as we note briefly in the next subsection of this argument.

B. The Louisiana Statute's Avowed Purpose to Promote Academic Freedom Is a Weightless Contradiction in Terms

The Balanced Treatment Act, before it proceeds to compel creation-science teaching if evolution is taught, announces (§ 286.2) that it "is enacted for the purposes of protecting academic freedom." Appellants invoke this as the statute's secular purpose. But constitutional principles are not advanced or evaded by such plays on words.

This is not the first case in which the legislative avowal of a secular purpose has failed utterly as a disguise.

Stone v. Graham, 449 U.S. at 42; Abington School District v. Schempp, 374 U.S. at 223. It is absurd to pretend that the compelled teaching of creation-science as an equivalent of evolution is a means of promoting academic freedom.

Without the Balanced Treatment Act, science teachers are in fact free to go on as their learning directs them, teaching the theory of evolution as well as defects in and questions about the theory. That freedom is surely not enhanced, but is dissipated, by a statute compelling them to teach creation-science as the price of teaching about evolution. A likely result, as the fundamentalist sponsors foresaw, is that sound scientific teaching will be foregone in order to avoid paying the price, the teaching of non-science. See McLean v. Arkansas, 529 F. Supp. at 1273. Whether

declared in good faith or not, the Pickwickian description of this compulsion as the promoting of freedom cannot stand as a meaningful declaration of legislative purpose. If it has any significance at all, the Louisiana Act's statement of purpose serves only to highlight the purely and simply religious purpose for which it was passed.

C. Creation-Science Is Not "Science"

Natural science and natural scientists are not by definition either "for" or "against" religion. The Court will know, as the world does, that eminent scientists range from devout believers to atheists. The point of central consequence here is that the two realms of thought are separate and

distinct methods to understand reality.[12] Creation-science, whatever else may be said for or against it on other levels, is not "science" in any sense that a court in the late 20th century could accept as an intellectually valid use of the concept. The question is not one of "fact" that needs to be "tried" over again whenever a scientist is willing to swear to the legal conclusion that creationism is science. The question is as to the legally acceptable meaning of a key word in the modern world,

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12/ See, e.g., Resolution of the Council of the National Academy of Sciences, cited in Preface by Frank J. Press, Science and Creationism: A View from the National Academy of Sciences 6 (1984). See generally Remarks by Pope John Paul II to the Pontifical Academy of Sciences, October 3, 1981, published as Science and Scripture: the Path of Scientific Discovery, 11 Origins 277-80 (1981) (Catholic view); N. Sarna, Understanding Genesis 1-23 (1970) (Jewish view).

and the answer is ultimately for this Court as a matter of constitutional law in a case like the one here. Just as the Court knows judicially what is "religious" in this context, e.g., Stone v. Graham, 449 U.S. 39 (1980) (per curiam), it knows what people in our time call "science." And that does not include creation-science.13/

The National Academy of Sciences, not given to casual certainties, has stated this conclusion succinctly and unequivocally:

> It is . . . our unequivocal conclusion that creationism, with its accounts of the origin of life by supernatural means,

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13/ A good account of why creation-science does not qualify as science while the theory of evolution does is provided in Note, McLean v. Arkansas Board of Education: Finding the Science in "Creation Science", 77 Nw. U.L. Rev. 374, 396-400 (1982).

> is not science. It subordinates evidence to statements based on authority and revelation. Its documentation is almost entirely limited to the special publications of its advocates. And its central hypothesis is not subject to change in light of new data or demonstration of error. Moreover, when the evidence for creationism has been subjected to the tests of the scientific method, it has been found invalid.14/

That conclusion rests of course upon an essentially agreed understanding among scientists of the analytical context of science and its methods -- an understanding notably absent from the affidavits produced for appellants in this case. As stated by the National Academy of Sciences, scientific method is a system designed for

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14/ National Academy of Sciences, Science and Creationism: A View from the National Academy of Sciences 26 (1984).

> continuous testing, where corrections and new findings are announced in refereed scientific publications. The task of systematizing and extending the understanding of the universe is advanced by eliminating disproved ideas and by formulating new tests of others until one emerges as the most probable explanation for any given observed phenomenon.15/

Incorporating this view of the scientific method, and in terms aptly suited for a premise of decision in this case, Judge Overton defined science in McLean v. Arkansas Board of Education, 529 F. Supp. at 1267, in these terms:

> (1) [Science] is guided by natural law;
>
> (2) It has to be explanatory by reference to natural law;

15/ Id. at 9.

(3) It is testable against the empirical world;

(4) Its conclusions are tentative, i.e., are not necessarily the final word;

(5) It is falsifiable.

This definition, we submit, supplies a workable legal standard, granting that philosohphers of science continue to argue relative subtleties of detail.[16/] What suffices for

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16/ Karl Popper, a formidable voice in the philosophic discussion, has observed that scientific hypotheses are never finally verified, but can be falsified, making falsifiability the line of demarcation between scientific and non-scientific propositions. See generally K. Popper, The Logic of Scientific Discovery (1968). The sometimes recondite literature on the subject includes fascinating inquiries as to the meaning and scope, as well as the arguable decisiveness, of falsifiability as a sufficient test. For example, Thomas Kuhn, in his momentous volume, The Structure of Scientific Revolutions (1970), refines Popper's thesis to take into account that the appearance of one or two scattered anomalies will not serve to falsify a "paradigm," or central theory (such as, for example, Copernican astro-
(footnote continued)

this case, however the subtleties are resolved, is that creation-science falls

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nomy, Newtonian celestial mechanics, or Darwinian evolution). See id. at 146-50. Kuhn uses several examples of paradigm-testing, all of which assume familiarity with the scientific literature.

A lucid example of paradigm-testing is provided by philosopher Phillip Kitcher, based on the history of Newtonian celestial mechanics. Newton and his successors viewed the solar system as a collection of bodies subject only to gravitational interaction. Using the laws of gravitational motion they went on to compute the predicted orbits of the planets. The results usually conformed beautifully to prediction. Only the outermost known planet, Uranus, refused to conform to Newton's prediction. Some would have abandoned Newtonian celestial mechanics. Two astronomers, John Adams and Urbain Leverrier, pointed out that a yet undiscovered outermost planet could account for the anomaly, and charted what its orbit would look like if Newton's laws were correct. Scientists began to look for a planet according to these predictions and within a few years a new planet, Neptune, was found. The central claims of Newton's laws were saved by an auxiliary hypothesis, later confirmed by observation. Had the planet not appeared, a reexamination of the central theory might have been required. P. Kitcher, Abusing Science: The Case Against Creationism 45 (1982).

totally outside the vital definitional criteria of empiricism, testing by observation, tentativeness, and potential disconfirmation.

The divergence is most readily seen by contrasting with natural science the patently religious propositions of creation-science as stated by its proponents. The leading exponent of creation-science, H. M. Morris, has authored several books setting forth its tenets, which make obvious reference to the Book of Genesis. In a 1974 work for general readers, he describes the creation-science version of the four fundamental events characterizing the earliest days of the world and man:

> (1) Special creation of all things in six days . . . .

> (2) The curse on all things, by which the entire cosmos was brought into a state of gradual deterioration ['entropy'] . . . .
>
> (3) The universal Flood, which drastically changed the rates of most earth processes . . . .
>
> (4) The dispersion at Babel, which resulted from the sudden proliferation of languages and other cultural distinctives . . . .[17]

Then in the "public school edition" of Scientific Creationism, a text intended to aid public school teachers to introduce creation-science concepts into the classroom, the same author outlines the "creation model:"

> The creation model thus postulates a period of special creation in the beginning, dur-

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17/ H.M. Morris, The Troubled Waters of Evolution 109 (1974).

ing which all the basic laws and categories of nature, including the major kinds of plants and animals, as well as man, were brought into existence by special creative and integrative processes which are no longer in operation. Once the creation was finished, these processes of creation were replaced by processes of conservation, which were designed by the Creator to sustain and maintain the basic systems He had created.

In addition to the primary concept of a completed creation followed by conservation, the creation model proposes a basic principle of disintegration now at work in nature (since any significant change in a perfect primeval creation must be in the direction of imperfection). Also, the evidence in the earth's crust of past physical convulsions seems to warrant inclusion of post-creation global catastrophism in the model. 18/

18/ H.M. Morris, Scientific Creationism 12 (1975) (public school edition) (emphasis in original).

In the Arkansas legislative battle of the creationist campaign, the quoted conceptions were accepted as candid restatements. The Arkansas statute struck down in the McLean case contained, among what are now described as "incorrect illustrations," the following definition section:

> Creation-science includes the scientific evidences and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds.19/

19/ Ark. Stat. Ann. § 80-1666 (Supp. 1985).

The deletion of this definition in the Louisiana drafting process does not make a "science" out of the definitional void that Arkansas had filled with the identically proposed religious content.20/ Under the circumstances, only one conclusion can be drawn: the appellants' claims of secular purpose are a "sham," as was the facade pierced in Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam). See also Wallace v. Jaffree, 105 S. Ct. at 2500 (O'Connor, J., concurring) (footnote 4, supra).

In the objective, observational sense of facts as dealt with in the natural sciences -- and as distinguished from the

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20/ The Louisiana Balanced Treatment Act is studiously vague and tautological in defining creation-science as "scientific evidences for creation and inferences from those scientific evidences." La. Rev. Stat. Ann. § 17:286.3(2) (West 1982).

teachings of religious faith that derive from sources other than physical observation -- there is not a word of testable scientific fact in all the voluminous papers filed by appellants. The notion critical to all their submissions -- of "origin through abrupt appearance in complex forms of biological life"[21/] -- is in no meaningful sense a support for the conception of creation-science. "Abrupt appearance" may of course be taken as a supportable hypothesis, and may tend indeed to pose issues for any unyielding theory of evolution. But it is no testable evidence whatever for any theory of "Creation" or a "Creator" -- whether with traditional capital letters or in the putatively "scientific" guise of

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21/ Aff. of Miethe at ¶ 12, quoted in Appellants' Br. at 8; Appellants' Br. at 15; see also Aff. of Kenyon at ¶ 9, reprinted in Appellants' Br. at A-9.

lower case. Either way the overlay of "creation-science" upon evidences of "abrupt appearance" is either a disguised form of religious assertion or a proposition without scientific content in any acceptable meaning of "science" today.

What matters just here is that with or without the express definition of what it is, creationism is not science. In the articles of deeply held faith that it reflects and embodies, it may identify a place in the beliefs of most Americans more precious and more enduring than the tenets of any empirical discipline. But the faith, whether it follows the Bible completely literally or less so, is neither offered for nor accessible to empirical testing. It is neither verifiable nor falsifiable nor open to skeptical evaluation in light of observed natural phenomena. Indeed, when creation-

ists are giving their own account of themselves outside the courthouse, this non- or really anti-scientific essence is proclaimed rather than concealed, though the proclamation is made in a specialized use of the word "science:"

> [I]t is precisely because Biblical revelation is absolutely authoritative and perspicuous that the scientific facts, rightly interpreted, will give the same testimony as that of Scripture. There is not the slightest possibility that the facts of science can contradict the Bible 22/

Whether proclaimed or merely acknowledged, or deleted as "incorrect" for litigation purposes, this absolute certainty in advance

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22/ H.M. Morris, Scientific Creationism 15 (1974) (general edition) (emphasis in original). The edited version published as the "public school edition" deletes references to God and the Bible, and omits a chapter on the religious implications of creationism.

of debate and unfolding experience is the antithesis of science in any definition used among scientists and philosophers of science today.23/

23/ While certainty through revelation is hardly consistent with scientific debate, creationists have sometimes complained that their works are suppressed in scientific journals. A survey in 1982 of submissions to such journals appears to have refuted the charge. In a survey of 1000 scientific journals it was shown that during the three-year period January 1978 to October 1981, there were 18 published articles either on creationism or by individuals associated with the Institute for Creation Research (other than articles on unrelated science topics). Nine were editorials or criticism of the theory, nine were letters to the editor. More interesting were the findings on unpublished submissions. Of 135,000 articles received by 68 journals, only 18 were on scientific creationism. The reasons stated by reviewers for rejection of the articles were poor writing, poor reasoning, and failure to observe the canons of science. Lewin, Evidence for Scientific Creationism?, 228 Science 837 (1985), citing Cole & Scott, Creation-Science and Scientific Research, 63 Phi Delta Kappan 557 (1982).

D. Summary Judgment Was Proper, The Question Being One of Constitutional Law, Not a Triable Issue of "Fact"

In an effort to obscure the plainly religious nature of the Balanced Treatment Act, the appellants have relied upon affidavits from scientists and philosophers to show that there are questions of fact as to whether creation-science is a "science" rather than a set of religious propositions. But the question is seen upon analysis to be one of constitutional law, correctly resolved by the court below on knowledge judges share with the whole literate world, not a "triable" issue of fact.

The decisive question after all is whether the Louisiana Act has a secular purpose. Every relevant indicator makes it as clear as it was in Epperson that the purpose of the legislation is simply the

enforcement of "fundamentalist sectarian conviction . . . . " 393 U.S. at 108. Nevertheless, to tear away the transparent veil of attempted camouflage, it will also have been shown in this and other briefs before the Court that creation-science cannot be accepted as a "science" under any respectable use of the quoted word in our time. In the circumstances of this case, this conclusion becomes a matter of constitutional law no less clearly than the "factual" propositions that racial segregation in public schools injures disfavored minorities, Brown v. Board of Education, 347 U.S. 483 (1954), or that people may not be presumed rationally to "know" that marijuana, often grown in the United States, must have been imported, Leary v. United States, 395 U.S. 6 (1969).

The two cases last cited are analogous illustrations of questions literally "factual" that become settled as matters of constitutional law because they involve appraisals of social relations known to, and authoritatively judged by, this Court in rulings on the law of the Constitution. The question whether racial segregation in public schools injures minority children is "factual" only in what has now become a pointless sense. In the spring of 1963 a district judge for the Southern District of Georgia figured out that Brown v. Board of Education rested on erroneous factual premises and took evidence he found persuasive that racial integration, far from being constitutionally required, was actually injurious for both blacks and whites. Stell v. Savannah-Chatham County Board of Education, 220 F. Supp. 667 (S.D.

Ga. 1963). He was of course instantly reversed, 333 F.2d 55 (5th Cir. 1964). The authoritative judgment of this Court precluded retrial between different parties of the constitutional facts as this Court had found them.24/

A similar proposition emerges from the decision in Leary v. United States,

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24/ The idea of judicial notice of social facts extends considerably beyond segregation's unquestionably harmful effects. The presence of racial discrimination in the construction trades, the dangers of nuclear radiation, the problems of drug use and violent crime in the schools, and the high cost and limited celerity of the United States mails have been noticed respectively in United Steelworkers v. Weber, 443 U.S. 193, 198 (1979); Jaffee v. United States, 592 F.2d 712, 720 (3d Cir.), cert. denied, 441 U.S. 961 (1979); New Jersey v. T.L.O., 105 S. Ct. 733, 742 (1985); and United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 120 (1981) -- without the need for expert testimony.

supra -- and the mode of reaching the decision -- holding unconstitutional a presumption that a possessor of marihuana knew it to have been imported. The ruling embraced judgments about matters of fact. From the legislative record, from some findings in Leary's trial, and from a trial record in another case, see 395 U.S. at 39-52, this Court found that (1) substantial amounts of marihuana are in fact grown domestically and (2) a person possessing the substance might well believe it to have been home grown rather than imported. Nobody has supposed that these questions need to be tried over and over again to make certain that the presumption stays unconstitutional.

It bears emphasis that the question whether creation-science is a "science" is at most a subordinate question; it arises really as the ground on which appellants

assert a secular purpose for the Louisiana statute. The answer to that material question of purpose is one to be given by the Court as a matter of law.

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

Lynch v. Donnelly, 104 S. Ct. at 1369 (O'Connor, J., concurring).

This Court has consistently adjudicated establishment clause cases by simply recognizing the "plainly religious" nature of daily prayers and Bible readings and Ten Commandment displays in the public

schools without anything more. See Abington School District v. Schempp, 374 U.S. at 223; Stone v. Graham, 449 U.S. at 41. Like other First Amendment subjects this Court has addressed, for instance whether "fighting words" are likely to provoke the average person to retaliation or whether obscene material appeals to "prurient interests," determining if creation-science is religious is, at best for appellants, a mixed question of law and fact. See Wallace v. Jaffree, 105 S. Ct. at 2501 (O'Connor, J., concurring), citing Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1969 n.1 (1984) (Rehnquist, J., dissenting) and Miller v. California, 413 U.S. 15, 24 (1973). See also Miller v. Fenton, 106 S. Ct. 445, 451-52 (1985) (O'Connor, J.).

If the characterization of creation-science as a "science" ever

required a trial in this context, the requirement has been more than amply met in McLean v. Arkansas Board of Education, supra. As heretofore shown, Judge Overton in that case worked through the expert polemics as to the nature of creation-science and the meaning of "science" in the course of concluding that the Arkansas precursor of Louisiana's Balanced Treatment Act was unconstitutional. His conclusions are, in our submission, thoroughly sound and helpful in testing the path for this Court. Especially since "the determination of legislative facts does not necessarily implicate the same considerations as does the determination of adjudicative facts," Concerned Citizens v. Pine Creek Conservancy District, 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting), there can be no good reason for requiring the same ground to

be gone over again every time the fundamentalist text is revised in a new enactment. It may be that the Court will find useful the method of Leary v. United States, supra, finding constitutional facts in part from the record of another case in a trial court, see 395 U.S. at 42 n.81, 43 n.89, 48 n.97, 50 n.106, 51 n.111, 53 n.116. Or it may be sufficient, as is our preferred submission, to conclude that the problem is in no valid sense referable to triable facts, but rather a question to be determined from (1) a correct understanding of the meaning in our society of the basic concepts of "science" as distinguished from "religion" and (2) the Court's informed capacity for discerning the lack of a secular purpose in a statute so plainly embodying religious goals as the Louisiana Balanced Treatment Act.

CONCLUSION

The decision of the court of appeals should be affirmed.

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